UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 00-1031 (JR)
LOUIS CALDERA, Acting Secretary, U.S. Department of the Army, *et al.*,	:	
Defendants.	:	

MEMORANDUM

This suit, by five environmental groups concerned about the survival of the Florida panther, purports to challenge the issuance by the Army Corps of Engineers of 23 permits for various kinds of construction in South Florida. Upon closer inspection, it turns out, and plaintiffs indeed concede, that most, if not all, of the permitted work has been done, and that what plaintiffs really seek is an injunction that would order the Corps of Engineers (Corps) and the Fish and Wildlife Service (FWS) into a "consultation" to design a program that would provide broad "systemic" relief for the plight of the Florida panther. I have concluded, for the reasons set forth in this memorandum, that I do not have subject matter jurisdiction of plaintiffs' claims. The parties have cross-moved for summary judgment, but the correct

action – accomplished by the order attached to this memorandum – is dismissal.

Background

Plaintiffs are the National Wildlife Federation, the Florida Wildlife Federation, the Collier County Audubon Society, the Defenders of Wildlife, and the Sierra Club. They sue the Secretaries of the Army, Interior, and Transportation, alleging violations of the Endangered Species Act (ESA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). Their complaint alleges that the Florida panther "is one of the most endangered large mammals in the world," and that the federal defendants, "in defiance of their legal responsibilities to conserve the Florida panther, have failed to develop a meaningful plan to guide development so that people and the Florida panther can co-exist in southwest Florida." Compl. ¶¶ 1-2.

Plaintiffs complain that the Corps has "repeatedly issued permits [including the 23 at issue in this case] authorizing the destruction of Florida panther habitat without ever developing or carrying out a program for the conservation of the Florida panther or consulting with FWS regarding such a program[,]" thereby violating the ESA, APA, CWA, and NEPA. Compl. ¶¶ 76-107 (Counts I-VIII). The

complaint alleges that the FWS violated its duty, under the ESA and APA, to ensure against jeopardy in its permitting decisions and that it erroneously refused to consider the "cumulative effects of future federally-permitted projects and other future federal activities." Compl. ¶¶ 108-113 (Counts IX-X). Plaintiffs also complain that the Federal Highway Administration (FHWA) "has never consulted with FWS regarding the effects of its roadbuilding in southwest Florida, regarding the effects of its certification and approval of transportation planning on the Florida panther, or regarding the development of a program to conserve the Florida panther[,] . . . [and] has never carried out a program to conserve the Florida panther[,]" thereby violating the ESA. Compl. ¶¶ 114-118 (Count XI).

The complaint asserts that 26 – later reduced to 23 – individual permits and Nationwide Permit (NWP) authorizations[1] for the discharge of dredged or fill material into navigable waters under § 404 of the Clean Water Act were issued unlawfully by the Corps. Eight associations and

[1] Nationwide Permits are "general permits" issued by the Corps on a state, regional or nationwide basis "for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e). Some of the 23 permits in this case were authorized under NWPs. Compl. ¶¶ 35-40.

entities[2] holding some of those permits, or representing permittees, or owning land possibly affected by Florida panther habitat, promptly intervened as defendants and some of them moved for the joinder of the owners of the rest of the permits as necessary parties. Opposing that motion, at a hearing held on January 16, 2001, plaintiffs expressly disclaimed any intent to seek "site specific" relief. Tr. 1/16/01 at 11-12, 22. On the basis of that representation, I denied the joinder motion and directed the parties to proceed on their proposed schedule for filing cross-motions for summary judgment. Id. at 47, 49.

What remains of plaintiffs' prayers for relief, after the site-specific prayers for declaratory relief are removed,[3] are demands for broad programmatic relief: judicial declarations, inter alia, that the Corps unlawfully failed to consult with FWS regarding the development and implementation of a program to conserve the Florida panther and failed to carry out a program to conserve the Florida panther (¶ A), that FWS's policy precluding consideration of future federal

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[2] Association of Florida Community Developers, Inc.; Alico, Inc.; Barron Collier Company; Barron Collier Partnership; Bonita Bay Properties, Inc.; Collier Enterprises, Ltd.; Agripartners, G.P.; and Lee County, Florida.

[3] Paragraphs B and C seek a declaration that the 23 permits and NWP authorizations are invalid. Paragraph D seeks a declaration that all of FWS's no jeopardy findings for the projects are invalid.

projects in connection with ESA cumulative effects analyses is invalid (¶ E), and that FHWA violated ESA by failing to consult with FWS regarding the development and implementation of a program to conserve the Florida panther (¶ G); and injunctions both mandatory and prohibitory requiring, inter alia, the Corps to initiate a programmatic ESA consultation with FWS regarding the development and implementation of a program to conserve the Florida panther and "all Corps-permitted development projects that may affect the Florida panther" (¶ H), requiring the Corps to adopt and begin implementing a program for the conservation of the Florida panther (¶ I), requiring the Corps to complete a programmatic EIS regarding CWA § 404 permitting affecting the Florida panther (¶ J), and prohibiting the Corps from issuing any CWA § 404 permits for development projects affecting the Florida panther until its programmatic ESA consultation has been completed and its programmatic EIS and record of decision has been issued (¶ K).[4]

[4] Plaintiffs appear to have withdrawn this last request for relief in their reply brief: "Plaintiffs' request for an injunction barring the issuance of individual permits and FHWA certifications was placed in the Complaint as a precautionary measure to preserve Plaintiffs' options in the event of new developments affecting the panther. Plaintiffs do not currently intend to seek such injunctive relief in this case. If it becomes necessary for Plaintiffs to pursue this relief, Defendants will be free to raise whatever defenses may be available to them at that time." Pls.' Reply Brief at 7 n.8.

Analysis

Plaintiffs have faced a dilemma since the start of this case. If they sought relief specific to the 23 permits whose issuance they challenged, they would have to deal with those permits one at a time – and with many more parties defendant.[5] Moreover, because they concede that most of the permitted work is complete, Tr. 11/9/01 at 8-9, pressing for site-specific relief would require them to overcome the laches defenses interposed by defendants in their motions for summary judgment. If they abandoned their claims for relief specific to those 23 permits, on the other hand, their suit would run afoul of Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990), which held that the final agency action requirement of the APA, 5 U.S.C. § 704, precludes federal court jurisdiction of suits for broad programmatic relief. See Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001); Sierra Club v. Peterson, 228 F.3d 559, 567-71 (5th Cir. 2000) (en banc), cert. denied, 523 U.S. 1051 (2001).

That dilemma, and plaintiffs' struggle with it, was made plain early in this suit, when the intervenors presented

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[5] As part of their motion to join the permit holders as necessary parties, the intervenors also moved for bifurcation to require an independent review of each of the 23 permits, separate from each other and the larger systemic issues raised in plaintiffs' complaint. Intervenor Mot. 9/20/00. Plaintiffs vigorously opposed bifurcation that would require a separate review of each permit.

their motion to join the permit holders as necessary parties and to bifurcate. At the hearing on those motions, I said: "What I hear you saying is we are not asking for any relief with respect to these projects. We basically want to use them to illustrate a point, but unless we name them and talk about final agency action, Lujan says we don't have any standing here." Tr. 1/16/01 at 24. Plaintiff's counsel responded: "That's right. Lujan would say we have no ripeness, yes." Id.; see also id. at 11-12 ("We are not trying to change the terms of that permit. What were are trying to do is once we have established that that permit was illegally issued and we have established that the other 25 permits were illegally issued, we would come forward to Your Honor and ask the agencies to be sent into a consultation -- the [C]orps to be sent into a consultation with the Fish and Wildlife Service in order to address the illegalities with their program."); id. at 14 ("[T]he purpose of this case [is] not to modify a permit. It [is] to deal with the broader systemic problems with this program and to design prospective relief to address those systemic violations."). I relied upon plaintiffs' representations that they did not seek any injunctive relief against the 23 permits that they purport to challenge in ruling against the motion to join necessary parties. Id. at 47, 49.

At oral argument on the pending cross-motions, plaintiffs changed their position. Plaintiffs' counsel began his argument by filing a notice of supplemental authority and noting that "[w]hat's most important for me to emphasize to you today is that we have been able to refine the relief we seek in this case to address your Lujan concerns." Tr. 11/9/01 at 6 (emphasis added) (filing American Bioscience v. Thompson, 269 F.3d 1077 (D.C. Cir. 2001) and Montana Council of Trout Unlimited v. U.S. Army Corps of Engineers, No. 99-59-BLG-JDS (D. Mont. May 11, 2000)). Plaintiffs now sought a remand of the twenty-three permitting decisions: "It would be up to the Corps and not Your Honor to determine what to do. If the analysis shows the panther habitat was under-protected, the Corps will have a number of options at its disposal. It can decide to reopen permits and require additional mitigation from these permit holders. It can decide other conservation measures outside of reopening the permits is appropriate." Id. at 6-16.

Before this eleventh-hour change of position, plaintiffs appeared to regard the rule of Lujan as one that could be accommodated by artful pleading. Thus, Tr. 1/16/01 at 25, "We were conscious and careful not to make this a claim on the merits against a program of issuing permits in Florida panther habitat. We were quite careful to list these

projects in specificity and the only discussion of the program is in relation to our claim for relief."[6] But Lujan, particularly as explained and applied in Peterson, is not so easily circumvented.

In Lujan, the National Wildlife Federation (the same organization that is the lead plaintiff in this case) challenged the "land withdrawal review program" of the Interior Department's Bureau of Land Management, alleging that "violation of the law is rampant within this program -- failure to revise land use plans in a proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements." 497 U.S. at 875, 890-91. The Supreme Court, reversing the Court of Appeals, focused on plaintiff's broad programmatic complaints. Id. at 890-91. It held that plaintiff "cannot seek wholesale improvement of this program by court decree,

[6] This "care" is not apparent from the face of the complaint, which makes broad programmatic allegations. See, e.g., ¶¶ 29-30 ("Since 1993, the Corps has completely disregarded its ESA and CWA duties to conserve the Florida panther and its habitat. . . . In at least 26 instances since 1993, the Corps has illegally issued individual permits or NWP authorizations for development in Florida panther habitat."); ¶ 2 ("The Defendants in this action, in defiance of their legal responsibilities to conserve the Florida panther, have failed to develop a meaningful plan to guide development so that people and the Florida panther can co-exist in southwest Florida.").

rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." Id. at 892 (emphasis in original).

Particularly instructive is the Fifth Circuit's recent en banc application of Lujan in Sierra Club v. Peterson. In that case, the Sierra Club -- also a plaintiff here -- and other groups challenged the United States Forest Service's "even-aged timber management in the Texas forests." 228 F.3d at 562. The complaint singled out twelve specific and allegedly improper timber sales, but plaintiffs "made clear that these sales were examples of the larger even-aged management techniques they were challenging rather than the extent of their challenge." Id. at 563 (emphasis added); see Am. Farm Bureau v. United States Envtl. Prot. Agency, 121 F. Supp. 2d 84, 102-03 (D.D.C. 2000) (relying on Peterson to reject plaintiffs' use of "examples" of final agency action to establish a larger pattern of agency misconduct). The plaintiffs' "programmatic challenge" was not "made justiciable by the fact that the environmental groups identified some specific sales in their pleadings that they argue are final agency actions." Id. at 567. "Rather than limit their challenge to individual sales, they merely used these sales as evidence to support their sweeping argument that the Forest Service's 'on-the ground' management of the

Texas forests over the last twenty years violates the NFMA [National Forest Management Act]. This is clear from their allegations, . . . from their evidence . . . and from their requested relief." Id. at 567-68 (citing finding of no final agency action in Lujan, 497 U.S. at 879, even though " [a]ppended to the amended complaint was a schedule of specific land-status determinations, which the complaint stated had been 'taken by defendants since January 1, 1981' ").

In the instant case, just as in Peterson, and notwithstanding plaintiffs' last-minute attempt to "refine" their prayers for relief, the specifically challenged permits are really only examples of what plaintiffs see as rampant unlawfulness in the permitting program of the Corps and FWS. See, e.g., Pls.' Mot. at 4 ("This case focuses on 23 development projects in panther habitat that illustrate a pattern of arbitrary and illegal behavior by the Corps and FWS with respect to the panther."); Pls.' Reply at 26 ("Plaintiffs here are not seeking to enjoin or undo any of the projects challenged in this case . . . .");

> We are not trying to change the terms of that permit. What we are trying to do is once we have established that that permit was illegally issued and we have established that the other 25 permits were illegally issued, we would come forward to Your Honor and ask the agencies to be sent into a consultation . . . to address the illegalities with their program. . . . But the appropriate relief is going to be in the

> nature of a declaratory judgment or an injunction that goes to the broader issues raised by this case. . . . [T]he purpose of this case [is] not to modify a permit. It [is] to deal with the broader systemic problems with this program and to design prospective relief to address those systemic violations.

Tr. 1/16/01 at 11-14 (emphasis added); see also Prayer for Relief ¶ I ("Enjoin the Corps to adopt and begin implementing a program for the conservation of the Florida panther."); id. ¶ J ("Enjoin the Corps to complete a programmatic EIS regarding CWA § 404 permitting affecting the Florida panther."); id. ¶ M ("Enjoin FHWA to adopt and begin implementing a program for the conservation of the Florida panther.").

Plaintiffs' prayer for judicial declarations that the permits and various "policies" of the agencies are invalid does not save their case. Prayer for Relief ¶¶ A-G; President v. Vance, 627 F.2d 353, 364-65 n.76 (D.C. Cir. 1980) (declaratory judgment ordinarily granted only when it will serve a useful purpose). Since the plaintiffs have maintained that they do not seek site-specific relief, cf. Tr. 1/16/01 at 15 ("Your Honor in making its declaration can be quite clear that this determination of validity is for the sole purpose of establishing ripeness of our claims and the sole purpose of your order is to establish prospective relief."), the prayer for declaratory relief is merely

another way of approaching the programmatic relief that this court does not have the jurisdiction to grant.

Plaintiffs complain that "[f]orcing Plaintiffs to challenge each permit separately at the time of issuance, the alternative proposed by Defendants, would be a waste of resources." Pls.' Reply at 26. Rather, plaintiffs argue that their approach, "through which Defendant's illegal approaches to permitting are addressed in a single case in a comprehensive fashion, is the far more efficient means of dispute resolution." Id. They may be right about that, but Lujan rejected the argument. "The case-by-case approach that this requires is understandably frustrating to an organization such as respondent [National Wildlife Federation], which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts." Lujan, 497 U.S. at 894; Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 734-35 (1998).

The above discussion, and the parties' briefs and arguments, leave one loose end relating to the challenge to the NWPs. Although plaintiffs have been quite clear that they do not seek relief specific to the 23 permits identified in their complaint, they do continue to seek a declaration

that several of the NWPs are invalid "as applied." Tr. 11/9/01 at 105; see also Compl. ¶¶ 35-40, 96-99; Prayer for Relief ¶ C. That position would appear to have implications for work yet to be done under existing NWPs and would, if plaintiffs were to sharpen their argument, perhaps require consideration of whether any more work could be done under those NWPs in the areas of panther habitat. I do not understand that plaintiffs have made such a narrowly tailored request for injunctive relief, but the accompanying dismissal of this action for want of subject matter jurisdiction will be without prejudice to that claim, if and when plaintiffs see fit to make it.

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JAMES ROBERTSON
United States District Judge

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ORDER

For the reasons set forth in the accompanying memorandum, plaintiffs' complaint is **dismissed** for want of subject matter jurisdiction. The cross-motions for summary judgment [#50] [#54] [#55] [#56] [#58] are **denied**. The motions to strike [#64] [#71] are **denied** as moot.

_____
JAMES ROBERTSON
United States District Judge

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